IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 100 of 2000

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHIKHABHAI CHAIMANBHAI RAVAL

Versus

STATE OF GUJARAT

Appearance:

MR YV BRAHMBHATT for Petitioner

MR KP RAVAL, APP for Respondent

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 21/03/2000

ORAL JUDGEMENT

1. This is a revision application under section 397 read with section 401 of the Criminal Procedure Code at the instance of the original accused, challenging the judgement and order of conviction passed by the learned JMFC, Nadiad, in Criminal Case No.931/84, wherein the accused was convicted and sentenced for an offence under section 408 of IPC, which judgement and order stood

confirmed by the judgement and order of the Sessions Court, Nadiad in Criminal Appeal No.2/95.

2. I have heard the learned counsel for the petitioner at length and I have perused such oral and documentary evidence on record to which my attention has been drawn.

3. In the first instance learned counsel for the appellant sought to contend that the impugned judgement and order of the Sessions Court suffers from non-application of mind, looking to the answer given by the said court to the point for determination at item no.2. In this context in the point for determination framed by the Sessions Court at item 2, the question raised is to the effect, as to whether it is necessary to interfere with the order of conviction and sentence passed by the learned Magistrate against the appellant under section 408 of IPC. The answer to this question has been given by the Sessions Court as "in the affirmative". This is an obvious mistake inasmuch as the answer, looking to the entire text of the judgement, ought to have been "in the negative". I am satisfied, looking to the logic, reasoning and the entire tenor of the judgement, that the Sessions Court has upheld the judgement and order of the learned Magistrate in recording the conviction and passing the order of punishment in its entirety, and that therefore obviously, according to the learned Sessions Judge there was no occasion to interfere. The answer, therefore, ought to have been in the negative which through error and oversight has been stated to be in the affirmative. In my opinion this is a mere grammatical and/or ministerial error and this cannot be overstretched to mean that the Sessions Court has not applied its mind to the facts or the law urged in the appeal.

4. Learned counsel for the petitioner then urged that the judgement and order of conviction and sentence is also illegal and erroneous inasmuch as "entrustment" of the funds in question to the accused has not been proved by appropriate and satisfactory evidence on record. In this context learned counsel for the petitioner seeks to rely upon a number of decisions of the Supreme Court and other courts wherein it is laid down in the context of section 408 that the essence of the said section must be proved and that proof of entrustment of the money is a condition precedent.

4.1 There is no controversy and there cannot be any controversy as to the principle laid down by the Supreme

Court. Unless entrustment of the fund in question into the charge or custody of the accused is proved, the said accused cannot be convicted and punished under section 408 of IPC. In view of this well recognised principle I do not propose to discuss the various decisions cited by the learned counsel in greater detail.

5. On a careful perusal of the impugned judgement in question, and also a scrutiny of the oral and documentary evidence on record, I am satisfied that "entrustment", in order to sustain the conviction under section 408 has, on the facts of the case, been established.

6. It is well established from the record that at the relevant point of time the accused was functioning as the Secretary of the Cooperative Society, that during the relevant period a recovery in respect of loans advanced by the cooperative society was made to the extent of Rs.1,78,000 and odd, that the cash amount was in fact received and receipts thereof were officially issued, and that the cash amount received was actually received by the accused and remained with him as cash balance shown on the accounts of the society. The evidence of prosecution witness No.3 at Exh.33 (Gopalbhai Jethabhai Shah) who was an Inspector with the Kheda District Central Cooperative Bank since 1978, shows that it was his duty to check the accounts of various cooperative societies, including the present cooperative society, that the accused was a secretary of the said society, and this society had received a loan from the said bank, and therefore it was his duty to check the accounts of the society on behalf of the lender bank. According to this witness the realisations and recoveries made by the cooperative society are to be written in the daily accounts by the Secretary, that the cash balance is retained by and is in the custody of the secretary, and on the relevant date when he inspected the accounts of this secretary he found that receipts for such realisation had been prepared, but the relevant amounts have not been reflected in the daily accounts and therefore he had written to the Nadiad Bank requesting the Government for an audit.

7. Prosecution witness no.4 at Exh.143 (Nathalal Maneklal) states that he was at the relevant point of time an Auditor of Cooperative Societies, and as such had carried out the audit of the cooperative society in question, that the accused was the Secretary of the cooperative society at the relevant point of time, that it was discovered during his audit that the cash realisation of the society had not been credited in the

daily account, and that the accused had made a statement before him on a voluntary basis that this amount being Rs.1,78,000 and odd had been spent by the secretary-accused in his personal expenses. This voluntary statement by the accused made before this witness Exh.143 is at Exh.63 on the record of the Criminal Case.

8. Learned counsel for the petitioner seeks to contend with reference to section 24 of the Evidence Act that such a confessional statement is of no use and cannot be availed of by the prosecution in a criminal case, by virtue of the provisions of the said section. This is an over simplification of the provisions of section 24 inasmuch as in order to make such a confessional statement inadmissible in a criminal case the court must first be satisfied that such statement was made by the accused by inducement, threat or promise, and that such threats or promises have emanated from a person in authority so as to give sufficient grounds to the accused to reasonably believe in such threats or promises. On the facts of the case, apart from mere plea that this statement was made by threats or any inducement, there is nothing on record to lead the court to any satisfaction so as to invoke the provisions of section 24 of the Evidence Act. As aforesaid, it is merely a case put up by the accused that these statements were obtained by threats or inducement. No doubt, this was also a case put up to prosecution witness no.4 (Exh.143) in the cross-examination of the said witness Nathalal Maneklal. However, the said witness has strenuously denied this suggestion put up on behalf of the accused. Besides this, the confessional statement is in writing, and proved at Exh.63 on record. Apart from plea taken, as discussed hereinabove, and the suggestion put to the said witness in his cross-examination, there is no other corroborative evidence either led or even suggested by the accused to support this contention. It may also be noted that this confessional statement in writing is not revoked or retracted in any form or manner by the accused either before the trial or at any stage of the trial.

8.1 It also appears that the aforesaid contention based on section 24 of the Evidence Act was not urged in the lower court.

9. Learned counsel for the petitioner then contends that the charge is extremely vague as to the misappropriations, and the various amounts misappropriated on various dates. No doubt this is

facile submission made precisely with a view to facilitate the contention, which, however, is without substance. To my mind, the charge is sufficiently precise when it states that during the period between 5th July 1980 and 30th December 1980, when the accused was secretary of the cooperative society, and during which he had realised Rs.1,78,000 and odd on behalf of the society, instead of crediting the same to the accounts of the society, he had used the amount for his personal use and had, therefore, committed an offence under section 408. As already discussed hereinabove, the amount of Rs.1,78,000 and odd is the amount which ought to have been shown at the credit balance on a given day, and when the secretary was asked to produce the cash balance on the given day, the only reply was that it has been used by him for his personal use. It is, therefore, on the facts of the case not necessary to establish what was the credit balance from day to day, and whether the misappropriation has been committed by the accused on a day-to-day basis and in respect of what amount on which day.

10. In the premises aforesaid I see no reason to interfere with the judgement and order of the Sessions Court confirming the judgement of conviction and sentence imposed by the learned Magistrate.

11. This revision is, therefore, dismissed.

12. At this stage learned counsel for the petitioner requests that the present judgement and order be stayed for a period of four weeks to enable the petitioner to approach the Supreme Court. Accordingly the present judgement and order is stayed upto 24th April 2000 on the same terms and conditions imposed by the Sessions Court in its order dated 29th February 2000. Direct service is permitted.

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